Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-958

JAMES C. KINKADE, Et Al., - - Respondents,

versus

COMMERCE UNION BANK, Trustee of Justin Potter Grandchildren's Trust, Et Al., - Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KENTUCKY

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No. _____

JAMES C. KINKADE, Et Al., - - *Respondents,*

v.

COMMERCE UNION BANK, Trustee of Justin Potter Grandchildren's Trust, Et Al., - *Petitioners.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KENTUCKY

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Commerce Union Bank, Trustee of Justin Potter Grandchildren's Trust, the Island Creek Coal Company, and the Badgett Mine Stripping Corporation, petition for writ of certiorari to review the decision of the Supreme Court of the State of Kentucky decided on May 28, 1976, in the above styled action.

OPINIONS BELOW

The decision of the Supreme Court of the State of Kentucky, whose Judgment is herein sought to be reviewed, is at present unreported and is presented as

Appendix A to this petition. The Judgment of the Muhlenberg Circuit Court, an unreported opinion, is printed as Appendix B to this petition.

JURISDICTION

The Judgment of the Supreme Court of the State of Kentucky was entered on May 28, 1976. A timely petition for rehearing was denied on October 15, 1976. A copy of the Order of October 15, 1976, is printed as Appendix C to this petition. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the language used in the mineral deeds grants to the petitioners the right to mine the coal within and underlying the respondents' property by the strip or open pit method of mining upon the payment of the sums set forth in the severance deed for each acre used for that purpose.

2. Whether a decision of a state court which is contrary to the settled common law can be retroactively applied to affect vested property rights.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The respondents, as surface owners of real estate in Muhlenberg County, Kentucky, brought suit against the petitioners to identify the rights of the respective parties and to prohibit the petitioners from strip mining the coal under the respondents' tracts. The petitioner, Commerce Union Bank, is the owner of the mineral estate to said lands; the petitioner, Island Creek Coal Company, is the lessee; and the petitioner, Badgett Strip Mining Corporation, is the sublessee of the coal within 125 feet of the surface.

The petitioners' right to strip mine the property to recover the coal is based upon the language used in three mineral deeds conveyed to Elijah Bassett. The three mineral deeds were executed in 1906 and all contained very similar granting clauses. The petitioners are remote grantees of Elijah Bassett.

On February 23, 1906, T. W. Martin executed and delivered a deed to Elijah Bassett to *all of the coal* within and underlying property in Muhlenberg County, Kentucky, and the deed was properly recorded in Deed

Book 62, page 336, in the Muhlenberg County Court Clerk's Office. The deed provided:

> The party of the Second Part, his heirs, successors and assigns shall take under this deed the perpetual right to mine and take from under the land hereinabove described *all the coal* that may be *in and under* the same and dispose of said coal as he or they see proper; and is granted the right *to enter upon* said land for the purpose of opening mines and the right of ingress and egress *on* and beneath the surface to and from any mine opened by the party of the Second Part, or his successors in title and the right to *such surface space as may be necessary in mining operations* including the right of way for any Railroad that may be necessary for the transportation of said minerals and for *such surface space as it may take* for the purpose aforesaid. Said party of the Second Part or his successors in title agrees to pay before *taking same* and the parties of the First Part, for themselves *and their successors in title agree to accept* the sum of thirty dollars per acre if any of said land shall be damaged in mining operations of the party of the Second Part or his successors he or they shall pay *the then owner* of the surface of said land at the same rate per acre for the portion so damaged. (Emphasis added.)

On June 30, 1906, J. F. Gish, et al., executed and delivered a deed to Elijah Bassett to *all of the minerals* except oil, gas and water within and underlying property in Muhlenberg County, Kentucky, and the deed was properly recorded in Deed Book 64, page 596,

Muhlenberg County Court Clerk's Office. The deed provided:

> The Party of the Second Part his heirs, successors and assigns shall take under this deed the perpetual right to mine and take from under the land hereinabove described *all the minerals* heretofore conveyed and dispose of said minerals as they may see proper and is granted the right to enter *upon said land* for the purpose of opening mines and the right to ingress and egress *on* and beneath the surface to and from any mine opened on said land by the party of the Second Part or his successors in title and the right to *such surface space as may be necessary in mining operations* including the right of way for any railroad that may be necessary for the transportation of said minerals under and on said land and for *such surface space as it may take* for the purposes aforesaid party of the Second Part, or his successors in title agree to pay before *taking same* and the parties of the First Part for themselves *and their successors in title agree to accept* the sum of Fifty ($50.00) Dollars per acre if any of said land shall be damaged in mining operations of the party of the Second Part or his successors (he) or they shall pay *the then owners* of the surface of said land at the same rate per acre for the portion so damaged. (Emphasis added.)

On November 21, 1906, Minerva Jarvis executed and delivered a deed to Elijah Bassett to *all the coal* within and underlying property in Muhlenberg County, Kentucky, and the deed was properly recorded in Deed

Book 62, page 346, in the Muhlenberg County Court Clerk's Office. The deed provided:

> The party of the Second Part, his heirs, successors and assigns shall take under this deed the perpetual right to mine and take from under the land hereinabove described *all coal* that may be in and under the same and dispose of said coal as he or they see proper, and is granted the right to enter *upon said land* for the purpose of opening mines and the right of ingress and egress *on* and beneath the surface to and from the mine opened by the Party of the Second Part, or his successors in title and the right, to *such surface as may be necessary in mining operations* including the right of way for any railroad that may be necessary for the transportation of said minerals and for *such surface space as it may take* for the purpose aforesaid said party of the Second Part, or his successors in title agree to pay before *taking same* and the party of the First Part for herself *and her successors in title agree to accept* the sum of thirty dollars per acre if any of said land shall be damaged in mining operations of the party of the Second Part or his successors, he or they shall pay *the then owners* of the surface of said land at the same rate per acre for the portion so damaged.

The Evidence

Strip mining was known and practiced in Muhlenberg County, Kentucky, at the time the deeds were executed. In the most definitive publication on the subject of strip mining in Kentucky, *Strip Mining in Kentucky* (1965), published by the Department of Natural Resources, it is stated that the first strip mine in Kentucky was opened in 1820 on the Green River in Muhlenberg County.

Each of the three deeds conveyed to Elijah Bassett all of the coal. At the time of the mineral severance, comparable fee simple estates were selling for $3 to $5 an acre.

There is physically present within and underlying the respondents' property the No. 11 and the No. 12 seams of coal. The No. 12 seam of coal cannot be mined at all by the underground method of mining. Only 50% of the No. 11 seam of coal can be recovered by the deep method of mining. The uncontroverted evidence is that there would be a loss of 23,000,000 tons of coal if the property cannot be mined by the surface or strip method of mining.

The Rulings Below

The Muhlenberg Circuit Court held that strip mining had not been practiced when the deeds were executed and that the parties contemplated a recovery of the minerals by the deep or shaft method of mining. The Supreme Court of Kentucky affirmed the decision of the Muhlenberg Circuit Court prohibiting the petitioners from strip mining the respondents' property.

REASONS FOR GRANTING THE WRIT

I. The Contractual Rights Between the Parties Have Been Arbitrarily and Capriciously Altered in Violation of Settled Principles of Law and Contrary to the Undisputed Facts Resulting in a Taking of the Petitioners' Vested Property Rights Without Due Process of Law.

II. At a Time When Public Policy Demands That the Nation's Natural Resources Not Be Wasted, the Supreme Court of Kentucky Has Prohibited the Safest and Most Economical and Efficient Method of Recovering the Nation's Coal Reserves.

Both the Opinion of the Muhlenberg Circuit Court and the Opinion of the Supreme Court of Kentucky have placed great emphasis on the absence of any language in the granting clauses of the mineral deeds specifically mentioning strip mining or the right to strip mine. But whether or not the granting clauses contained certain "magic words' 'is not important in this case. Rather, the Court should be concerned with the rights specifically enumerated in the deeds and those which can be reasonably inferred.

In *Buchanan* v. *Watson,* Ky., 290 S. W. 2d 40, the mineral owner was conveyed all of the coal and certain rights in, of, to, on and under the land; he was allowed to use the surface in any and every manner deemed necessary or convenient to mining; he was relieved of all liability for damage to the surface occasioned by said mining and the grantor reserved the right to use the surface for agricultural purposes only to the extent that it was compatible with the rights granted to the mineral owner. Although there was no mention of the

right to strip mine, the Court held that the mineral owner could use the strip method of mining.

The Chancellor in *Buchanan* was of the opinion that neither party to the deed had even contemplated strip mining. Nevertheless, the Court held that since the mineral owner had been granted the right to mine *all* of the coal, the particular method contemplated by the parties, in the absence of language prohibiting certain methods, did not preclude him from utilizing the only feasible process of extracting the coal.

A. J. Croley v. *Round Mountain Coal Company,* Ky., 374 S. W. 2d 852, involved an action by the surface owner to prohibit strip mining. The mineral owner was asserting rights under a mineral reservation rather than a mineral deed. The reservation merely reserved the rights of ingress and egress to take and remove the minerals; there was no waiver of damage clause. Even in the absence of any language mentioning strip mining, the Court held that the owners had the right to strip mine the property. In speaking of and affirming *Buchanan,* the Court stated that the waiver of liability for surface damage was not controlling. It further stated:

> An examination of the opinion discloses that the decision was based simply on the proposition that the parties clearly intended to convey the coal; that the purpose of the conveyance was to enable the grantee to remove the coal from under the surface of the land; and that to deny the grantee the right to remove the coal by the only feasible process would defeat the principle purpose of the conveyance. 374 S. W. 2d at 852.

In *Martin* v. *Kentucky Oak Mining Company,* Ky., 429 S. W. 2d 395, the Court considered a 1905 deed which granted the mineral owner the right to use so much of the surface space as may be necessary or convenient in the conduct of mining operations. The surface owner sought a declaration that the mineral owner did not possess the right to strip mine. The Court in *Martin* stated:

> Whether or not the parties actually contemplated or envisioned strip or auger mining is not important—the question is whether they intended the mineral owner's rights to use the surface in the removal of the minerals to be superior to any competing rights of the surface owner. 429 S. W. 2d at 397.

In the Sixth Circuit Court of Appeals, the U. S. District Court in *Peabody Coal Company* v. *Pasco,* 452 F. 2d 1126, applying Kentucky law, applied the rule of *Martin* to two separate mineral deeds and concluded that one granted the right to strip mine and one did not. The Court based its decision on the grant (or omission) in the conveyance of the right to use the surface.

The 1919 deed was held not to have granted the right to strip because:

> These references to underground mining, plus the fact that the mineral owners were given *no rights to use the surface for mining purposes,* indicate that the mineral grantee had not 'bought and paid for the right to destroy the surface.'

The 1914 deed in *Pasco* conveyed the coal and permitted the grantee the right to mine "without liability for any damage that may arise to the surface" and all other rights and privileges "in and about said land on the surface or underneath the surface thereof, incident to and required by the successful and profitable mining." The Court applying the rationale of both *Buchanan* and *Martin* held that the 1914 deed expressed with sufficient clarity that the parties intended the mineral owner's rights would be superior to any competing right of the surface owner.

As a review of the above cases would indicate, the cases which have permitted strip mining have involved deeds which either give the mineral owner rights to the surface of the land such as the right to use the surface in any manner deemed necessary or convenient *(Buchanan, Martin),* or the right to remove any and all minerals in and under the land *(Croley).* It is pointed out in *Pasco,* though not dispositive of the issue, such language is evidence that the original parties intended that the mineral owner's rights to use the surface in the removal of the minerals to be superior to any competing right of the surface owner.

The Muhlenberg Circuit Court and the Supreme Court of Kentucky placed considerable emphasis on the fact that numerous subsurface rights were mentioned and the grantee-mineral owners were given the right to mine and take the coal from *under* the surface. It is only reasonable that the mineral owners are granted numerous subsurface rights because their mineral estate is located below the surface. But there was no language

in the deeds indicating that the mineral owners were limited to only subsurface rights. In addition to the subsurface rights, the mineral owners were expressly given the right to mine *all of the coal;* the right to enter *upon* said land; the right of ingress and egress on and beneath the surface; and the grantee had the right "to such surface space *as may be necessary* in mining operations." The only limitation was a provision requiring the payment of $30 or $50 per acre for any of the lands taken during the mining of the coal.

Case v. *Elkhorn Coal Company,* 210 Ky. 700, 276 S. W. 573, involved the determination of whether the surface owner or the mineral owner had the superior right to use a portion of the surface. The deed provided:

> also vendee is granted the use of the surface for every purpose that it may deem necessary or convenient in the prosecution of its mining business, with the right to remove all pillars and other lateral support in its mines without leaving any support to the roof or the surface.

The Court in *Treadway* v. *Wilson,* 301 Ky. 207, 192 S. W. 2d 949, referred to the Case deed and quoted the Case holding:

> Clearly the defendant (mineral owner) has the paramount right to use the surface in the prosecution of its business for any purpose of necessity or convenience, and of this *it is to be the judge,* unless it exercises this power oppressively, arbitrarily, wantonly, or maliciously. 192 S. W. 2d at 950.

It seems clear that the Court in *Buchanan* and subsequent cases merely affirmed a basic principle of property law which would appear obvious: That the conveyance of property carries with it, either expressly or by implication, such rights as are necessary to use and enjoy the property conveyed. Coal would be of little benefit to anyone without the right to mine it. If the petitioners are unable to strip mine the property, 75% of their mineral estate cannot be enjoyed. Clearly the petitioners have the right to be the sole judge of whether the use of the surface is necessary for the removal of coal as long as the right is not exercised oppressively, arbitrarily, wantonly or maliciously.

In *Kodak Coal Company* v. *Smith,* Ky., 338 S. W. 2d 699, the surface owner objected to the proposed strip mine operation because there were other satisfactory alternative methods of recovery available. The Court, quoting from *Blue Diamond Coal Company* v. *Neace,* Ky., 337 S. W. 2d 725, stated:

> The mere exercise of a right to mine in any particular fashion cannot of itself be classified as arbitrary, wanton or malicious. It is the manner of the mining operation, as distinguished from the fact that it is being carried on, that determines liability for damages. 338 S. W. 2d at 700.

In the case at hand, the mineral owner was also granted "the perpetual right to mine" the coal. The term "mine" is not limited to those cases where a shaft is sunk into the ground but may include other methods which may be necessary to take possession of and re-

move the minerals conveyed, such as "strip," "open cut," or "hydraulic" methods of mining. *Rudd* v. *Hayden,* 265 Ky. 495, 97 S. W. 2d 35.

The rights of the respective parties rest upon the construction given to the granting clauses of the mineral deeds. A deed will be so construed as to make it operative and effective in all of its provisions, if susceptible to such construction. *Swearingen* v. *McGee,* 303 Ky. 825, 198 S. W. 2d 805. The deed does not become ambiguous by the assertions of one seeking to avoid its effect. An unambiguous deed which grants land and certain specific rights and privileges will be construed and strictly enforced according to its terms. *McIntire* v. *Marion Coal Company,* 190 Ky. 342, 227 S. W. 298.

The mineral grantees in the present case were granted the "perpetual" right to mine the coal. Such future use, of necessity, must be made under conditions different from those existing at the time of the conveyance. This is particularly true in a mineral deed where the lapse of time between the severance and the actual mining of the coal is usually great. Under such circumstances it must be presumed in the absence of clear language to the contrary that the future use to be made of the property will take into account normal technological developments. *Restatement of Property,* §484, Comment (a).

It is abundantly clear that the mineral owners were conveyed all of the coal in and under the property. The deeds specifically state that the mineral owners have the right to use as much of the surface as is necessary to recover their coal. It is obvious that the parties contemplated that some of the surface would be taken during mining operations because the deeds specifically provided that the surface owners would be compensated for the surface so taken.

The exercise by the grantee-mineral owners of any rights expressly or impliedly conveyed to them cannot be complained of by the grantor, who can claim no other limitation upon the rights of the grantees but those expressed or implied in the deeds. *Holbrook* v. *Hammond,* 302 Ky. 10, 192 S. W. 2d 746.

The respondents assert that should the petitioners be permitted to strip mine the property to recover the coal, the surface estate will be suitable for nothing other than the cultivation of a few scrub trees and weeds. There is no evidence to support a conclusion that the surface will be destroyed. Chapter 350 of the *Kentucky Revised Statutes* clearly requires that after the land has been strip mined that it be returned to its approximate contour and planted in trees, shrubs, grasses and legumes to provide a suitable vegetative cover. There is nothing in the record to suggest that the respondents' land will not be reclaimed according to the requirements of the current reclamation laws.

The respondents point out that numerous improvements have been placed on the property making it much more valuable today than in 1906. The evidence in the case is clear that near the time these conveyances to Elijah Bassett were made, the entire fee simple title, including surface and minerals and all improvements thereon, of comparable property was selling at $3 to $5 per acre. Even though $3 to $5 per acre is nominal

by today's standards, it was substantial at the time the deeds were executed. The present market value of the property is irrelevant; the value of the land is to be determined at the time the deeds were made in 1906. Th Court of Appeals of Kentucky in *Martin* fully answered the respondents' arguments.

> We think the fact that in many instances, as here, the landowner was being paid, for the mineral rights alone, practically the full value of his land, might well indicate that the landowner chose to retain the *bare* title simply for what little value, if any, it might have.
>
> If, as appears well may have been the case, the landowner who executed the broad form mineral deeds at the turn of the century were paid prices which substantially or in large part equalled the full value of the land (at least of the hillside land) we see nothing unfair, unjust, or inequitable in construing the deeds in favor of the grantees . . .
>
> Certainly the fact that the surface land is worth much more today than it was in 1905 is not a reason for saying that the landowners should be paid again.

The present surface owners had notice that their surface rights were inferior to the rights of the mineral owners and are estopped to complain of the exercise by the mineral owners of the rights specifically granted to them. The mineral deeds to Elijah Bassett were properly of record when all subsequent transfers of the surface were made, including the conveyances to respondents herein. Therefore, all of the respondents

were on constructive notice of the extent of the surface rights acquired by Elijah Bassett in 1906. The respondents took their surface title subject to the superior rights of the mineral estate owner and should not be heard to complain.

In May of 1956, the Court of Appeals of Kentucky, rendered its decision in *Buchanan* v. *Watson,* and set forth quite clearly the rights of the respective parties to a mineral deed. As the Court pointed out in *Neace, Buchanan* did not change any existing law but merely applied the old principles to a new fact situation. The Court of Appeals in Kentucky has reaffirmed the *Buchanan* decision on a number of occasions. *Neace; Kodak Coal Company; Croley; Ritchie* v. *Midland Mining Company,* Ky., 347 S. W. 2d 548. Coal operators across the state of Kentucky made large investments to acquire mineral rights and to purchase expensive machinery in reliance upon the rights as defined by *Buchanan.*

Valid contract rights are property and as such are protected by the due process clauses of the Fifth and Fourteenth Amendments. *Thorpe* v. *Housing Authority of Durham,* 393 U. S. 268, 89 S. Ct. 518, 21 L. Ed. 2d 474. The right to devote real estate to any legitimate use is property within the protection of the Constitutional guarantees. *Washington, ex rel, Seattle Title Trust Company* v. *Roberge,* 278 U. S. 116, 49 S. Ct. 50.

The Court can only interpret the contract made. It may not substitute what the grantor may have intended to say for the plain import of what he said. *MacMahan*

v. *Huntsinger,* Ky., 375 S. W. 2d 820. Even though the Court may have serious concerns about the impact of strip mining on the environment, it is not the role of the Court to act as a super-legislative body by setting aside the property laws of the state simply because it might consider the laws to be unwise or harsh.

The majority opinion of the Supreme Court of Kentucky makes no attempt to reconcile its decision with its numerous previous opinions such as *Buchanan, Martin, Neace, Croley* and *Ritchie* upholding the right to use the strip method of mining to recover the coal. The decision of the Supreme Court of Kentucky has arbitrarily and irrationally restricted the contract rights of the mineral estate owner to a degree never contemplated by the original grantor. The Court has given the surface owner a privileged position to the detriment of the mineral owner contrary to settled principles of law. The decision is in clear conflict with settled principles of law and the retroactive application of the decision results in a taking of the petitioners' property rights without due process of law in violation of the Fourteenth Amendment. *Pennoyer* v. *Neff,* 95 U. S. 714; *Shelley* v. *Kramer,* 334 U. S. 1, 68 S. Ct. 816, 92 L. Ed. 1161; *Postal Telegraph Cable Company* v. *Newport, Kentucky,* 427 U. S. 464, 38 S. Ct. 566, 62 L. Ed. 1215.

In *Neace,* the Court of Appeals of Kentucky stated:

> It would be a grave matter indeed for this Court by overruling it now, to upset property rights which have since vested in reliance upon it. Short of that which is proved to be arbitrary, wanton, or

> malicious, the control of commercial mining practices is strictly a matter of legislative regulation. 337 S. W. 2d 728.

In *Miles* v. *National Bank of Kentucky,* 140 Ky. 376, 131 S. W. 26, at page 27, the Court stated:

> If the rule there declared is now to be changed, it should be changed by the legislature and not by the court; for business has been confirmed to it and it may have governed not only the courts below but the parties themselves in controversy.

CONCLUSION

WHEREFORE, petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF KENTUCKY

RENDERED: MAY 28, 1976

73-539

COMMERCE UNION BANK, Et Al. - - - *Appellants*

v.

JAMES C. KINKADE, Et Al. - - - - *Appellees*

Appeal from Muhlenberg Circuit Court
Honorable Arthur T. Iler, Judge
Civil Action No. 6397

OPINION PER CURIAM—AFFIRMING

Commerce Union Bank, Trustee of Justin Potter's Grandchildren's Trust; Island Creek Coal Company and Badgett Mine Stripping Corporation appeal from a judgment of the Muhlenberg Circuit Court holding that certain mineral conveyances did not grant the right to mine the coal by the strip or open-pit method.

Commerce Union Bank, Trustee, owns the coal in controversy. Island Creek is lessee of all the coal owned by the bank, and Badgett is sublessee of the No. 11 vein or seam and all veins or seams above No. 11. Kinkade (4 acres), Harper (45 acres), and Gray and Armstrong (35 acres) own the surface over this coal.

In an action filed by the surface owners against the mineral owner and lessees, it was stipulated as follows:

> "Plaintiffs do not seek a declaration that the defendants have no rights of any kind in the surface of the real estate. The only issue concerning the mineral severance in this action is whether the grant to the mineral owner precludes the mining of minerals therefrom by the strip method of mining."

Island Creek conceives the issue to be:

> "The principal question to be decided on this appeal upon the record as it now exists is whether the language included in the deeds * * * grants to the appellants, owner, lessee and sublessee, the right to mine the coal within and underlying the appellees' property by the strip or open pit method of mining, upon the payment of the sum set forth in the severance deeds for each acre used for that purpose."

The contested mineral severances read in part as follows:

> *Minerva S. Jarvis to Elijah Bassett, February 21, 1906—*
>
> "* * * has bargained and sold and by these presents does bargain sell and convey unto the party of the second part his heirs successors and assigns all the coal and the coal mining privileges in and under the following described tract or parcel of land * * *."
>
> * * * * * * * *
>
> "The party of the second part, his heirs successors and assigns, shall take under this deed the perpetual right to mine and take from under the land hereinabove described all coal that may be in and under the same

> and dispose of said coal as he or they see proper and is, granted the right, to enter upon said land for the purpose of opening mines and the right to ingress and egress on and beneath the surface to and from any mine opened by the party of the second part, or his successors in title and the right to such surface space as may be necessary in mining operations including the Right of Way for and Railroad that may be necessary for the transportation of said minerals, and for such surface space as it may take for the purpose aforesaid said party of the second part or his successors in title agree to pay before taking same and the party of the first part for herself and her successors in title agrees to accept the sum of thirty dollars per acre if any of said land shall be damaged in mining operations of the party of the second part or his successors he or they shall pay the then owner of the surface of said land at the same rate per acre for the portion so damaged."

J. F. Gish to Elijah Bassett, June 30, 1906—

> "* * * have bargained and sold and by these presents, do bargain sell and convey unto the party of the second part his heirs successors and assigns all the minerals except oil, gas and water with the mining rights and privileges in and under the following described tract of land, * * *."
>
> * * * * * * * *
>
> "The party of the second part, his heirs successors and assigns shall take under this deed the perpetual right to mine and take from under the land hereinabove described all the minerals heretofore conveyed, and dispose of said minerals as they may see proper, and is granted the right to enter upon said land for the purpose of opening mines and the right of ingress and egress on and beneath the surface to and from any

mine opened on said land by the party of the second part or his successors in title and the right to such surface space as may be necessary in mining operations including the right of way for any Railroad that may be necessary for the transportation of said minerals under and on said land and for such surface space as it may take for the purpose aforesaid said party of the second part or his successors in title agree to pay before taking same and the parties of the first part for themselves and their successors in title agree to accept, the sum of $fifty per acre if any of said land shall be damaged in mining operations of the party of the second part, or his successors he or they shall pay the then owners of the surface of said land at the same rate per acre for the portion so damaged."

T. W. Martin to Elijah Bassett, February 23, 1906—

"* * * have bargained and sold and by these presents do bargain sell and convey unto the party of the second part his heirs successors and assigns all the coal and the coal mining privileges in and under the following described tract or parcel of land * * *."

* * * * * * * *

"The party of the second part his heirs, successors and assigns, shall take under this deed the perpetual right to mine and take from under the land hereinabove described all the coal that may be in and under the same and dispose of said coal as he or they see proper, and is granted the right to enter upon said land for the purpose of opening mines and the right of ingress and egress on and beneath the surface to and from any mine opened by the party of the second part, or his successors in title and the Right to such surface space as may be necessary for mining operations including the right of Way for any Railroad that may be necessary, for the transportation of said minerals and for

such surface space as it may take for the purpose aforesaid. Said party of the second part or his successors in title agrees to pay before taking same and the parties of the first part, for themselves and their successors in title agree to accept the sum of thirty dollars per acre if any of said land shall be damaged in mining operations of the party of the second part or his successors, he or they shall pay the then owner of the surface of said land at the same rate per acre for the portion so damaged."

Although the early common-law requirement of *livery of seisin* was inconsistent with the passage of any fee interest in minerals in place as a separate estate, it is now well settled that a conveyance may separate minerals and surface into independent legal estates and that the mineral estates so created may be dealt with as any other fee interest in land. Any deed of minerals carries with it the right to use as much of the surface as may be reasonably necessary to exploit the minerals coupled with the duty of the mineral owner to act with due care to protect the surface owner's rights. Cf. Wiser Oil Company v. Conley, Ky., 346 S. W. 2d 718 (1960).

While it is not unusual for the mineral deed to restrict even these implied rights, the trend within the industry has been to enlarge the grant to the extent that an owner may exploit the minerals on a more efficient and economical basis. Nevertheless, there must be a definite enlargement of specified mining rights in the instrument creating those rights before an owner may conduct mining operations contrary to the rights usually implied in a mineral grant. The enlargement of mining rights may be limited in character; yet at the other end of the spectrum we find some of the grants to be so extensive and all embracing that they are tantamount, in their effect, to grants of all surface rights. There seems to be no happy medium, nor is there any form

of grant which may be generally said to reflect the norm of the industry. Realizing the potential fact that no two grants of mining rights may be identical, it is necessary that a proper construction of such rights be confined to a deed-to-deed interpretation of clauses in a mineral deed which grant or modify mining rights.

A mineral deed, while embracing the "reasonably necessary" right to use the surface, may further restrict mineral operations to a particular method or methods or, to be more specific, may prohibit mining operations in certain areas or by certain designated methods. If the language of the grant is sufficient to clearly delineate the rights of the surface owner and the mineral owner and thereby establish the method or procedure to be used in the recovery of the minerals, both the surface and mineral owners will be limited to the method or contractual obligation of the parties as thus determined. We have consistently upheld what has been identified as the "broad form" or "Mayo deed" and in so doing have concluded that these deeds grant such overwhelming mining rights that the mineral owner in fact has the right to use the surface of the land, part or all of it, in recovering the coal acquired by the deeds.

This court has reexamined those cases in which we have considered the "broad form" deed and has concluded that the mineral deeds involved in this proceeding, and as quoted herein, do not contain language that is so extensive as to subordinate the rights of the surface estate to the demands of the mineral estate. The language of the conveyances in each of the three deeds is such that it must be readily realized that there was no grant of rights necessary for removing the coal by the open-pit or strip method but rather the language expresses the granting of rights which are primarily those necessary in the conducting of an underground mining operation.

The answer to the question now before us is very well stated in the court's opinion in Peabody Coal Company v.

Erwin, U.S. Court of Appeals, 6th Circuit, 453 F. 2d 398 (1971), wherein the court said:

> "Our view of the deed in this case indicates that it grants rights impliedly incident to underground mining but that it does not indicate the intention of the parties that the mineral owner bought the right to destroy the surface, or that it was intended that the mineral owner's rights to use the surface would be superior to any competing right of the surface owner."

The judgment is affirmed.

Clayton, Lukowsky, Palmore, and Sternberg, J.J., concur.

Stephenson, J., concurs in result only by separate opinion in which Jones, J., joins.

Reed, C.J., concurs in result only and files separate concurring opinion.

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SUPREME COURT OF KENTUCKY

RENDERED: MAY 28, 1976

73-539

COMMERCE UNION BANK, Et Al. - - - *Appellants*

v.

JAMES C. KINKADE, Et Al. - - - - *Appellees*

Appeal from Muhlenberg Circuit Court
Honorable Arthur T. Iler, Judge
Civil Action No. 6397

CONCURRING OPINION BY JUSTICE STEPHENSON

I agree with the result in this case; however, I disagree with the manner in which this mineral deed is distinguished from the "broad form" mineral deeds.

This disagreement is based on an analysis of the authorities cited in *Buchanan* v. *Watson,* Ky., 290 S. W. 2d 40 (1956). Here, as in *Buchanan,* the only feasible and economical method to mine the coal is by strip mining. *Buchanan,* in holding that the possessor of the mineral deed had the right to mine the coal by the method of strip mining, stated that "[t]he doctrine of stare decisis requires that we do not depart from the established rule." A good argument can be made now that *stare decisis* should govern in view of later cases based on *Buchanan,* but in my opinion the statement was clearly erroneous in 1956 when *Buchanan* was decided.

Buchanan is a perfect illustration of the mischief caused by an opinion which lifts a well-established and sound principle of law out of a prior opinion and cites it as authority in complete disregard of the factual situation in the cited cases.

Part one of *Buchanan* decided that the mineral holder had the right to strip-mine. From the legal myths that have grown up about the "broad form" deeds, it has been assumed that the right to strip-mine was based on the rights granted the mineral holder in the "broad form" deeds. Not so, *Buchanan* reached the conclusion that the coal company had the right to strip-mine in a curious fashion without particular reference to the mining rights granted in the John C. C. Mayo deed in question. There is cited a Pennsylvania case summarizing a portion of the majority opinion holding that the owners of the mineral had a right to strip-mine and the method by which the coal was removed was incidental to the right to remove it. A portion of the dissent is also cited. Then *Buchanan* gives the reasoning for holding that the coal could be strip-mined at page 42.

> *"The deed by express language did not exclude or include this method of mining,* although the proof shows that such mining methods were known and had been used prior to the date of the deed. *It seems clear that the parties intended the conveyance of the coal. To deny the right to remove it by the only feasible process is to defeat the principal purpose of the deed.*
>
> "We think the Chancellor correctly decided that since the appellant had the right to remove all of the coal in, on, and under the surface of this tract, the particular method contemplated by the parties (in the absence of language prohibiting other methods) does not preclude him from utilizing the only feasible process of extracting the coal. In Rudd v. Hayden, 265 Ky.

495, 97 S. W. 2d 35, it was pointed out that 'mining' is not limited to the sinking of a shaft but may include other methods, including strip, which may be necessary to take possession of and remove the minerals conveyed." (Emphasis added.)

Buchanan clearly holds that if strip mining is the only feasible means of removing the coal, then the mineral owner had the right to strip unless the mineral deed prohibits strip mining. In passing, it would appear that this principle fits the instant case precisely. *Rudd* deciding an unrelated matter defined mining, for what this definition is worth, by saying "strip" is a method of mining. It did not anywhere in the opinion base the definition on the "method which may be necessary to take possession and remove the minerals conveyed." "Hydrualic" mining also is included in the definition. I am unable to grasp the reasoning that would include this as authority for holding that the owner of the mineral has the right to strip-mine the coal.

Then Buchanan proceeds to pose the next question: "Having decided that appellant is entitled to 'strip mine' the coal, when is he liable to the surface owner for damage for destruction of the surface or the growing timber thereon?"

It is interesting that this right is not based on any authority in this jurisdiction, so I am not impressed with the statement on *stare decisis*. It is on the question of damages that the "broad form" deed comes into play, and it is here that sound authorities are distorted beyond recognition.

The reasoning in *Buchanan* is divided into three parts. Part one is as follows:

"Two fundamental rules for construction of deeds are set forth in McIntire v. Marian Coal Co., 190 Ky. 342, 227 S. W. 298, 299. They are:

"'* * * that a deed which grants land and certain specified rights and privileges, there being no ambiguity in the instrument, will be construed according to its terms, and enforced strictly according to its terms. But, where there is ambiguity or uncertainty in the deed, it will be construed most strongly against the grantor and in favor of the grantee.

"'* * * that the instrument shall be construed most strongly against the grantors and in favor of the grantee both upon the grant of the property and the rights and privileges specified.'

"See also Cornett v. Louisville & N. R. Co., 298 Ky. 95, 182 S. W. 2d 230; Isaacs v. Inland Steel Co., 305 Ky. 777, 205 S. W. 2d 681; Clements v. Morgan, 307 Ky. 496, 211 S. W. 2d 164. In the Cornett and Isaacs cases, the deeds were very similar to the deed under consideration."

McIntyre involved a "broad form" deed, and the opinion stated, "*there being no ambiguity in the instrument* it will be construed according to its terms," and held that the coal company had the right to erect and maintain houses, tipples, stores, roads or other structures used in connection with its mining lease.

Cornett, in its opinion construing a "broad form" deed, found *no ambiguity* in the instrument and held that the coal company had the right to build a railroad to its mine as provided in the mineral deed.

Isaacs held that the landowner did not prove that the mining operation caused damages to a two-acre reservation in the mineral deed and for some obscure reason quoted the above principle of law from *McIntire*.

Clements construed a deed containing this language, "coal and mineral privilege sold."

I see no authority here that would be helpful in making a decision on liability for damage and have yet to see any ambiguities in the "broad form" deed.

Proceeding to part two, *Buchanan* states a fundamental rule:

> "The rights of the respective owners of the surface and of the minerals underneath in similar deeds have been determined and declared. The owner of the mineral has the paramount right to the *use* of the surface in the prosecution of its business for any purpose of necessity or convenience, unless this power is exercised oppressively, arbitrarily, wantonly, or maliciously, in which event the surface owner may recover for damages so occasioned. McIntire v. Marian Coal Co., 190 Ky. 342, 227 S. W. 298; Case v. Elk Horn Coal Corporation, 210 Ky. 700, 276 S. W. 573; Collins v. Lackey Mining Co., 219 Ky. 31, 292 S. W. 1091; Pike-Floyd Coal Co. v. Nunnery, 232 Ky. 805, 24 S. W. 2d 614; Wells v. North East Coal Co., 255 Ky. 63, 72 S. W. 2d 745; United Carbon Co. v. Webb, 282 Ky. 79, 137 S. W. 2d 733; Treadway v. Wilson, 301 Ky. 702, 192 S. W. 2d 949; Elk Horn Coal Corp. v. Johnson, Ky., 249 S. W. 2d 745, second appeal, Ky., 263 S. W. 2d 124." (Emphasis added.)

McIntire involved a deep-mine operation and stated that the mineral estate is dominant and superior, but should the coal company take improvements on the surface, such taking would have to be after satisfaction or adjudged compensation for such improvements, then went on to say that the company could not use the surface for any other purpose not *specifically granted by the deed* or reasonably to be inferred from the nature and terms of that instrument.

Case construing a "broad form" deed stated that the coal company has the paramount use of the surface unless

it exercised its power oppressively, arbitrarily, wantonly or maliciously and that the coal company had a right to locate and construct an electric transmission line over the surface for the operation of a deep mine.

Collins cited *Case* as to paramount use of the surface but found that the coal company had acted capriciously and not in good faith and ordered the coal company to remove homes constructed on surface owners' land to house miners engaged in mining coal on other properties.

Pike-Floyd Coal Co., in construing a "broad form" deed cited *McIntire* on construction, stated that there was no ambiguity in the deed and held the coal company liable for damages for dumping refuse from another deep-mine operation on the surface covered by the mineral deed.

Wells cited *Case* and *Pike-Floyd*. The opinion discussed the evidence of claimed damages and the elements, such as building electric power lines and other activities of a deep-mine operation clearly authorized by the specific terms of the "broad form" deed in question.

United Carbon dealt with a claim for damages during the course of drilling a gas well. The surface owners claimed a trespass, and the court citing the above cases set out the rights under a mineral deed and found that the surface owner did not plead or prove exercise of the rights in an arbitrary, oppressive, or malicious manner.

Treadway held that the mineral owner had the right to strip mine, citing *Case*, *Pike-Floyd*, and *Wells*.

The opinion reversed the trial court for refusal to permit the filing of an answer averring that the coal could be mined by deep-mining methods and that strip mining would be oppressive. The reversal directed the trial court to hear evidence on the issue and determined the rights of the parties accordingly.

Elkhorn Coal Corp. involved a claim for damages for subsidence of the surface. The opinion found that the right

to support had been waived by the express terms of the mineral deed and reversed with the remark that if there was evidence of arbitrary, wanton, or malicious conduct, on retrial the question should be submitted to a jury.

Part two will be discussed with part three below.

> "The validity and enforceability of a waiver of damages have been recognized as well as that of such grants of mining rights just discussed. The only qualification imposed in exercising these rights with respect to any given situation is that in order to be relieved of liability for damages, the rights must not be exercised arbitrarily, wantonly, or maliciously. Himler Coal Co. v. Kirk, 205 Ky. 666, 266 S. W. 355; Kentucky West Virginia Gas Co. v. Crum, 258 Ky. 508, 80 S. W. 2d 537; Inland Steel Co. v. Isaacs, 283 Ky. 770, 143 S. W. 2d 503; Trivette v. Consolidation Coal Co., 296 Ky. 529, 177 S. W. 2d 868; Isaacs v. Inland Steel Co., 305 Ky. 777, 205 S. W. 2d 681."

In *Himler* the severance deed conveying the surface and reserving the minerals did not reserve any mining rights, and the opinion enunciated the basis for the *dominant* theory of the mineral estate. "Its reservation of the minerals in the conveyance to Barrett necessarily reserved to it and its grantees the right to dig through the surface to the minerals, to mine them in such a way and in such quantities as not to destroy the support of the surface, to bring these minerals to the surface and transport them over the surface from the opening to the market. Such rights are absolutely necessary to the reasonable enjoyment of the mineral reserved." The opinion held that the owner of the mineral had a right to construct a railroad over the surface, but that the construction was a way of convenience, not a way of necessity. The case was reversed

for a trial on the damages to the surface if the mineral owner took any of the surface for which there was not a strict necessity. The opinion does not mention any "waiver of damages."

In *Kentucky West Virginia Gas Co.,* involving a John C. C. Mayo mineral deed, the opinion observed that there was no effort to prove that the gas company in drilling its well and laying pipelines performed any of these operations in an arbitrary, wanton, or malicious manner. The opinion held that the surface owner could recover for destruction of crops and fencing. Also recovery was allowed for timber cut by the company which was not reasonably necessary in the exercise of its rights.

In *Inland Steel,* construing a "broad form" deed, the opinion stated that "the mining company had the right as defined in the mineral deed to discharge water on the surface as might be 'necessary or convenient.' Such rights may not be exercised 'arbitrarily, capriciously, oppressively or wantonly' but must be exercised with due regard to and consistent with the interest and rights of the owner of the surface."

In *Trivette,* involving what appears to be a "broad form" deed, the opinion held that the coal company had the right to construct an electric transmission line over the surface. The opinion observed that the coal company made every effort to select a location for the line which would disturb the least quantity of timber. There was no issue of damages in the case.

Isaacs, cited in part one, stated that the coal company would not be liable for any injuries to the land which were caused by its normal mining operation.

The principle of creating separate mineral and surface estates by deed brought with it the problem of delineating the rights of the owners of the separate estates.

The theory of the mineral estate being *dominant* evolved to take care of a situation like that presented in *Himler* where no mining rights were reserved. In those situations, the installation and operation of a deep mine and its *use* of the surface were limited to operations and installations considered to be necessary as opposed to convenient but not necessary. In the mineral deeds reserving mining rights, the coal company was not so limited, depending on the express rights reserved or granted. Examples of rights that must be expressly granted to absolve the coal company of liability for damages are sudsidence rights and the right to use timber for the mining operation. *Buchanan* did not discuss the "subsidence" cases, none of which have been overruled. In my opinion, it is wildly inconsistent to have a rule of law that renders a deep-mine operator liable for damages if the company removes coal pillars and causes the surface to subside in the absence of an express grant to do so, and say, as in *Buchanan*, that the holder of the mineral deed can completely destroy the surface by strip mining.

It is significant that each case cited in parts one, two, and three in *Buchanan*, with the exception of *Treadway*, recited principles of law applicable to the deep-mining operation involved in the case.

These sound and practical principles of law in every instance represent an effort by the court to permit the maximum enjoyment of the owner of each separate estate, consistent with the rights of the other owner. There is a thread running through all these opinions and that is the exercise of express, necessary or convenient rights by the holder of the mineral estate should not interfere more than reasonably necessary with the full enjoyment of the surface estate. By fiat *Buchanan* destroyed this carefully structured balance and in application of these rules to a strip-mining operation, distorts the rules out of all meaning. *Buchanan*

and the later cases up to and including *Martin* v. *Kentucky Oak Mining Co.*, Ky., 429 S. W. 2d 395 (1968), pay lip service to the doctrine of separate estates, but the holdings result in the practical effect of saying that the mineral estate is not only *dominant* but *exclusive* in that no real right to enjoy is left to the surface estate. I say this for the reason that I cannot visualize an estate that has any rights reserved to it when it can be stripped and completely destroyed. *Martin* reasoned that since "the landowners who executed the 'broad form' deed were paid prices which substantially or in large part equaled the full value of the land (at least of the hillside land), we see nothing unfair, unjust or inequitable in construing the deeds in favor of the grantees. Certainly the fact that the surface of the land is worth much more today than it was in 1905 is not a valid reason for saying that the landowners should be paid again." The opinion further states, "the landowner was being paid, for the mineral rights alone, practically the full value of his land."

The logical deduction for this reasoning is that the price paid for the mineral estate determines the rights of the surface owner, and since he received full value, the concept of two separate estates vanishes and there remains only one. *Buchanan* did say that "the deed created two separate and distinct estates."

In my opinion, this represents an astonishing line of reasoning. I have not found a prior case holding that the price paid for the mineral estate determined the rights of the surface estate. I have not searched for one either. If there is one, I do not want to know about it.

Parts two and three of *Buchanan* discuss the right to *use* the surface unless the right is exercised oppressively, arbitrarily, wantonly, or maliciously. This rule evolved as a standard to test "necessary and convenient" mining rights,

and by any test limited the coal company to a prudent exercise of the rights so as to not give it a license to use or destroy the surface. Insofar as the installation of the deep mine and its operation is reasonable, the coal company is not answerable in damages *unless* it involves taking or damaging improvements as set out in *McIntire.* See also my concurring opinion in *Kentland-Elkhorn Coal Company* v. *Charles,* Ky., 514 S. W. 2d 659 (1974).

This runs through all the cases cited in *Buchanan* and confirms my opinion that the "waiver of damages" in the "broad form" deed is superfluous. How these principles can apply as stated in *Buchanan* is beyond my comprehension. If the holder of the mineral deed has a right to strip mine and to completely destroy the surface, how can he exercise this power oppressively, arbitrarily, wantonly, or maliciously?

I am not at all impressed with the mystique that has attached to the "broad form" deeds. Expressions such as "overwhelming rights" and "grants so extensive and all embracing that it is tantamount, in its effect, to a grant of all surface right" as recited in the opinion here leave me with a feeling that indeed such a document should contain strange and wonderful language, but I find none. The "broad form" deeds in all their manifestations clearly and expressly provide for those installations and operating procedures routinely found in a deep mine. With the occasional inclusion of "subsidence rights" and more frequently the express rights to use standing timber of a certain size in the mining operation, all else is usual in a deep-mine operation. The fact that the scrivener felt some compulsion to go into tedious and minute detail in describing the mining rights does not, in my opinion, elevate those documents to the degree of significance that has been ascribed to them.

After *Buchanan* somehow the idea evolved that the right to strip-mine was found in the "broad term" deeds. There

is not a case in this jurisdiction that has found any ambiguity in the language of the "broad form" deeds. *Buchanan* stands for the proposition that the right to strip-mine, unless specifically excluded, is an incident to the ownership of the coal if that is the only feasible and economical method of removal.

Treadway, decided in 1946, made a quantum leap in holding that the mineral owner had the right to strip-mine for the reason that the mineral owner has the paramount right to the use of the surface, citing *Case, Pike-Floyd Coal Co.,* and *Wells. Buchanan* did not cite Treadway as authority for the right to strip-mine. *Treadway* based its holding on a misunderstanding of the rule in the cases cited therein. The opinion reversed the trial court for not permitting to be filed an answer alleging that stripping would be "oppressive" and sent the case back for trial on that issue. We hear no more from *Treadway.*

The difficulties that arise from attempting to apply rules of law lifted out of one factual situation and wedged into a completely different factual situation is well illustrated by *Martin's* treatment of the opinion in *Wiser Oil Company* v. *Conley,* Ky., 346 S. W. 2d 718 (1961). If *Buchanan* and the later cases are correct and the same reasoning applied, *Wiser* should have been decided differently. *Martin* declined to reconcile or distinguish *Wiser* in my opinion for the good and sufficient reason that it could not by any logical test.

In my opinion, *Treadway, Buchanan* and their progeny are aberations in the law of minerals. They should be overruled, and the right to strip-mine should be limited to those mineral deeds specifically granting or reserving such right; otherwise, the consent of the surface owner should be necessary. This would once again give effect to those cases which structured the respective rights of the owners of the mineral estate and the surface estate.

Jones, J., joins in this concurring opinion.

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SUPREME COURT OF KENTUCKY

RENDERED: MAY 28, 1976

73-539

COMMERCE UNION BANK, Et Al. - - - *Appellants*

v.

JAMES C. KINKADE, Et Al. - - - - *Appellees*

Appeal from Muhlenberg Circuit Court
Honorable Arthur T. Iler, Judge
Civil Action No. 6397

SEPARATE CONCURRING OPINION BY CHIEF JUSTICE REED

The opinion of Justice Stephenson is an excellent analysis of the development of mineral law that culminated in the unfortunate decision in Buchanan v. Watson.

My main concern is in giving a retrospective effect to the overruling of Buchanan. The reliance of parties on the law as specifically pronounced has especial significance in voluntary relationships between parties concerning property rights. I have no hesitation in applying Justice Stephenson's decision prospectively. I could not, however, destroy the property rights of parties who entered into voluntary relationships in the light of plainly expressed existing law.

Strict regulation and application of our nuisance theory approach are not, in my judgment, an impingement on the existing legal expectations of parties who acquired their rights under existing laws.

APPENDIX B

MUHLENBERG CIRCUIT COURT

No. 6397

JAMES C. KINKADE - - - - - - - *Plaintiff*

v.

COMMERCE UNION BANK, ET AL. - - *Defendants*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This cause coming on to be heard upon the pleadings, stipulations, exhibits, depositions and briefs filed herein prior to Motions to submit and the Court having examined and considered the same and being advised does now make its findings of fact, conclusions of law and judgment as set out herein below.

FINDINGS

The original severances of the three mineral estates from the surface occurred in 1906 when (1) Minerva Jarvis, (2) J. F. Gish and (3) T. W. Martin each conveyed all coal in and under their respective parcels of land to an attorney named Elijah Bassett in separate deeds but all were practically identical in the language employed; all three of them were notarized by Victor Behne; the phraseology in all of them is so similar in composition and content as to indicate

they were drafted by the same person. In the J. F. Gish deed we find this language:

> "Shall take under this deed the perpetual right to mine and take from under the land herein above described all *minerals* heretofore conveyed . . . and for such surface space as it may take for the purposes aforesaid (opening mines and the right of ingress and egress on and beneath the surface, etc.) said party of the Second Part, or his successors in title agree to pay before taking same and the parties of the First Part for themselves and their successors in title agree to accept the sum of fifty ($50.00) dollars per acre if any land shall be damaged in mining operations of the party of the Second Part or his successors (he) or they shall pay the then owners of the surface of said land at the same rate per acre for the portion damaged."

In the Minerva Jarvis deed the language is precisely the same down to the word "minerals" but there the scrivener uses instead the word "coal," and the party of the First Part etc. agrees to accept thirty ($30.00) dollars (instead of $50.00).

In the T. W. Martin deed the scrivener uses the word "coal" instead of "minerals" and it also provides for a payment of $30.00 instead of $50.00.

This similarity is conceded by defendant, Badgett Mine Stripping Corporation when in its brief his attorney selected only one of said deeds for reliance on its' position and theory of all three cases.

Defendant, Badgett Mine Stripping Corporation, is the sublessee of Island Creek Coal Company as to the number 11 and 12, 13 and 14 seams of coal above the 125 foot depth where the coal cannot be mined profitably, or with reasonable safety, by the underground method. The prime lease of Island Creek is from defendant, Commerce Union Bank

(Trustee of Justin Potter Trust which is owner of the minerals including other deeper seams which can be recovered by underground mining.)

Defendant Badgett has acquired in this field approximately 1,700 acres of which it controls approximately 1,500 acres of surface, leaving approximately 200 acres of surface above said mineral which it has been unable to buy from the surface owners, including plaintiffs, at a price Badgett was willing to pay, though said defendant has made an effort to do so by offers to pay amounts far in excess of the sums set out in the three deeds, *supra*.

The lands of plaintiffs are a part of that surface which Badgett desires to buy but has not acquired; seams No. 12, 13 and 14 are not in and under these parcels.

When these severances were made this section of Muhlenberg County was primarily agriculturally oriented and so much of it as has not been destroyed or converted to spoil banks is still applied to such usage and other non-mining uses. It is productive land which in the present market commands a good price for such purposes.

At the time these severances were made "stripping" had never been practiced or possibly, heard of. The terms "mining" and "coal mining" usually meant "the removal of coal by tunnels underground, and thence to the surface by way of tipples over vertical shafts and in some isolated cases through slopes dug into the side of a hill and downward to the seam of coal.

From 1906 and 1922 "strip mining" was unknown in this country. It was not considered feasibly possible, or profitable until the bulldozer came into use during World War II. Even then, there was no widespread acceptance of that method of recovering coal.

When the severances were made seams #9 and #6 were the seams most desirable; the value of the #11, 12, 13 and 14 coal was practically nothing for two reasons (1) the quality

was considered to be inferior and (2) there was no known underground method of recovery which was profitable where the overburden was below 100 feet. Existing methods for removal of such coal were inefficient and wasteful due largely to the faulty "roofs." The ratio of recoverable coal to the "coal in place" was too low (only about 25% of the coal in such a mine could be taken with any degree of safety, so that the going price per acre for #9 coal in place was practically the same as the price one would be compelled to pay for "all coal and minerals" in and under the surface; lower veins could be mined at greater cost, however and the quality of same is good and in demand.

There were isolated attempts before the advent of "strip mining" to mine upward to the No. 11 vein from the #9 tunnels or "workings" to recover coal from the #11 seam but this proved too expensive and hazardous and the practice was soon abandoned.

In those instances where the land owners conveyed the No. 9 coal only and the other instances where no severance was made as to the No. 11 coal at depths of 125 feet and less, the minerals were sold on a royalty per ton basis so that the operator paid royalty only on such coal as was mined and marketed. In the 1940's the going rate for royalty payments paid to land owners for coal leased to small underground wagon or truck mine operators which generally were operated through drifts near outcroppings of such veins as No. 11, 12, 13 and the so-called "bastard" seams. The practice was to pay the land-owner "royalty" on the coal mined and marketed at the end of each month. The amount paid by the lessee was 10¢ per ton ranging upward to as much as 25¢. Such operations required very little surface. It was highly inefficient due to the necessity for leaving large pillars of coal in place so as to avoid roof cave-ins. This waste (leaving of coal in place) amounted to approximately 75% of said coal. When strip-mining

became widespread it was possible to get practically all of the coal. Strip mine operators prefer to purchase the surface as opposed to paying royalty under a lease, though both devices are used In fact, in the case at bar, defendant, Badgett operates under the lease-royalty plan, that is to say he leases the minerals (No. 11, 12, 13 and 14) from Island Creek Coal Company and pays to the lessor a royalty of 10¢ per ton so long as the selling price of the coal marketed for $1.50 per ton or less. When the market price goes above $1.50 per ton, the royalty goes up to 20¢ per ton. The lessee is responsible for acquisition of the surface above subject coal that will by the removal be destroyed.

It will be noted from the lease agreement that the same is limited to such coal as Caney Creek is unable to recover by underground mining (at least three good seams of coal, to-wit Nos. 9, 8 and 6), so that the injury to be sustained by defendant, Badgett, from a failure to acquire the surface owned by these three plantiffs would be limited on the profit it would make on the coal beneath that surface which coal is owned by another and which Badgett will never own until it recovers and markets it and pays the royalty due and the possible loss to defendant Caney Creek will be the loss of said royalty it would receive if and when Badgett recovers the coal and markets it, lessor having already attempted to recover same from beneath and failed because of the deficient overburden and roof structure.

The pertinent portions of the severance deeds of these three parcels is contained in the deed of *J. F. Gish to Elijah Bassett,* set out below, parties having conceded in briefs filed herein that it is representative of all of them:

> "The party of the second part, his heirs, successors, and assigns shall take under this deed the perpetual right to mine and take from under the land hereinabove described all the minerals heretofore conveyed and dis-

> pose of said minerals as they may see proper and is granted the right to enter upon said land for the purpose of opening mines and the right to ingress and egress on and beneath the surface to and from any mine opened on said land by the party of the second part or his successors in title and the right to such surface space as may be necessary in mining operations including the right of way for any railroad that may be necessary for the transportation of said minerals under and on said land and for such surface space as it may take for the purposes aforesaid party of the second part, or his successors in title agree to pay before taking same and the parties of the first part for themselves and their successors in title agree to accept the sum of Fifty ($50.00) Dollars per acre if any of said land shall be damaged in mining operations of the party of the second part or his successors (he) or they shall pay the then owners of the surface of said land at the same rate per acre for the portion so damaged."

CONCLUSIONS OF LAW

The predecessors in title of each of the plaintiffs herein, in 1906 by lawful conveyances, severed the coal and/or minerals from under the surface (land remaining) together with the perpetual right to take all of said coal under the said surface, together with other mining privileges stated in the deeds of which privileges was the right to buy additional land or surface needed for specific necessary purposes at the rate of $30.00 per acre (or $50.00 in one instance).

Since the right to purchase such additional land from Plaintiffs is qualified, defendant Badgett may demand the land at the price stated in the severance deed only if and when those conditions are met, to rule otherwise would be equivalent to extending the power of Eminent Domain to Corporations. Our Constitution prohibits either the Leg-

islature or the Courts from making such an extension, so that defendants' only chance to acquire said land is by a voluntary sale resulting from mutual agreement by and between the buyer and the seller.

The chief and possibly the only question raised by this action is whether the defendants have acquired the right, in the respective deeds to strip-mine the lands in question and thereby destroy the surface of said lands and the improvements located thereon that are owned by plaintiffs. If such a right to take and to destroy exists, it is because the language of those deeds give that right as the original parties intended it to do.

The language employed by defendants predecessor in title, who either prepared the instruments of severance or caused them to be prepared, would not at first blush appear to support an interpretation that it was the grantors' intent to convey a fee simple title to his (or her) grantee so that such grantee could take it all from the grass roots to the center of the earth, neither can we authoritatively state that it was the intent of the parties in 1906 to sell the coal and convey with it a right to destroy every other segment of the land to an extent that after the taking the same it could be used for no broader purpose than to grow scrub pines or blades of grass between giant boulders remaining thereon.

In endeavoring to find the intent of the parties we must consider the situation and circumstances existing when the deeds were made.

In broad terms these deeds grant the right to remove the coal from under the surface along with other privileges respecting use of the land for necessary railroad tracks, roads of ingress and egress to the shaft or slope and other privileges necessary to promote the convenience of mining at a time when virtually all mining was accomplished by shaft mining and when virtually all coal and mining rights

were bought, rather than leased and the only disturbance of the surface involved was the tunnel and shaft openings, tipples and slate dumps.

It was not until World War II that the extraction of coal by stripping became so profitable as to entice operators to obtain massive machinery and adopt mining methods which greatly increased their production as well as the burdens on the surface estate by destruction of sources of water supply, changing land contours and placing upon the surface raw clay, gob, deleterious substances, rock boulders and the total destruction of all top soil on the land where this method of recovery is utilized and to the land adjacent thereto.

In a case similar to this one (Roberts v. Twin Ford Coal Co., 223 F. Supp. 752 (Ky. 1963) Judge Mac Swinford observed:

> "The legal question is not of course whether this is generally offensive conduct *but whether it is permitted by the terms of the mineral conveyance.*" (Emphasis supplied)

The answer to the question thus posed may be found in the instrument of conveyance:

"The party of the second part, his heirs, successors and assigns shall take under this deed the perpetual right to mine and take from *under* the land hereinabove described . . . (Emphasis supplied.)

And again:

> ". . . the land hereinabove described all coal that may be *in* and *under* the same . . ." (Emphasis supplied.)

It would appear reasonable to construe the phrase, "that is under the land" and the reference to coal that is "in and

under the same" as an intent of the parties that it would be mined in the conventional underground method.

Moreover, the instrument of conveyance refers to the right of entry upon said land "for the purpose of opening mines." People did not then and do not now "open" a strip mine, they are "started." There is nothing to open when the surface is removed, the seam of coal exposed and then loaded by tremendous shovels into trucks large enough to transport 50 tons (capacity of a railroad gondola.)

Another phrase which discloses an intent of the parties to protect and preserve the land is the provision for damages to the surface owner,

> ". . . if any of said land shall be damaged in the mining operation of the party of the second part, or his successors, he, or they shall pay to the then owner of the surface of said land at the same rate . . ."

It hardly seems probably that if strip or surface mining had been contemplated, the mineral severances would have provided for the entire surface estate instead of providing that damages be paid for destruction to other land retained in the deed by grantor.

In *West Virginia Pittsburgh Coal Co.* v. *Strong*, 42 S.E. 2d 46 (W. Va. 1947) the Court in analysing the effect of this provision on the intent of the parties as to whether the surface owner's rights were superior or subordinate to the mineral owner's rights, the court said at page 50:

> ". . . we believe, in this instance, that the purpose of the land owner to retain the surface undisturbed is further borne out by the deed's requirement to the effect that the owner of the coal shall pay the landowner for the surface occupied above the No. 8 vein at the rate of $100.00 per acre. That provision we believe plainly shows that it *was not* within the contemplation of the parties that the owners of the coal *by virtue of the mining rights granted* should be entitled to remove any part of the surface, except for the mouths of ordinary shafts or drifts, in connection with the removal of the coal. If removal of that nature had otherwise been included in the mining rights granted, that interpretation is certainly dispelled by the provision to pay $100.00 for the surface occupied or used certainly do not contemplate destruction. Furthermore, what we believe to be an option to buy the surface presupposes it's existence."

In another case involving the surface owner's rights decided in 1971 the Court said:

> "This instrument conveys "all of the coal and minerals, excluding the oil and gas, *underlying* a certain tract" and conveys "all the rights and privileges necessary to go *in and under* said tract." These references to underground mining plus the fact that the mineral owner is given no rights to use the surface for mining purposes indicate that the mineral grantee had not "bought and paid for the right to *destroy* the surface." (Citing Martin v. Kentucky Oak Mining Co., 424 S.W. 2d 395 (Ky. 1968).
>
> The particular rights given the mineral grantee. ("all the rights and privileges necessary to go in and under said tract of land and mine and remove therefrom said coal"), appear to be no more than would be implied in any conveyance of minerals. And since, as we have noted, *the Kentucky Courts* have refused to say that *any* deed of mineral rights *automatically* carries the right to strip, we can only conclude that the 1919 deed demonstrates no intention that the mineral owner's

right to use the surface is superior to any competing right of the surface owner." *Peabody Coal Co.* v. *P. C. Pasco, et al.*, 452 F. 2d 1126 (Ky. 1971).

It is therefore the view of this Court that the three deeds in this case indicate that they grant rights impliedly incident to underground mining but that they do not indicate the intention of the parties that the mineral owners bought the right to destroy the surface, or that it was intended that the mineral owners' rights to use the surface would be superior to any competing right of the surface owner.

JUDGMENT

It is therefore the view of this court that the three deeds in this case indicate that the titles to the property of plaintiffs as described by the pleadings and exhibits filed herein be, and the same are, hereby quieted and that plaintiffs have judgment for their costs herein expended and the counterclaims of defendants Badgett Mine Stripping Corporation, a Corporation, and Caney Creek Coal Company, a Corporation and Commerce Union Bank, Trustee for Justin Potter Grandchildren's Trust, be and they are, hereby dismissed.

This the 9th day of April, 1973.

/s/ Arthur T. Iler
Judge
Muhlenberg Circuit Court

COMMONWEALTH OF KENTUCKY

Supreme Court of Kentucky

MANDATE

Commerce Union Bank Et Al

File No. 75-539
VS. Opinion Rendered May 28, 1976

Appeal From Muhlenberg
Circuit Court Action No. 6397

James C. Kinkade, Et Al

The Court being sufficiently advised, delivered an opinion per curiam, and it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

Appellant's Petition for Rehearing Denied.

A Copy - Attest:

Issued ....October 15, 1976.....

Martha Layne Collins

MARTHA LAYNE COLLINS, CLERK

BEST COPY AVAILABLE